

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

DAVID MIZIC,  
Defendant

:  
:  
:  
: Case 01-CR-258  
:  
:  
:

TRANSCRIPT OF PROCEEDINGSF  
SENTENCING

**FILED**  
**HARRISBURG, PA**  
**FEB 23 2007**  
**MARY E. DIANDREA, CLERK**  
**Per**

BEFORE: HON. SYLVIA H. RAMBO, Judge

DATE: August 16, 2002

PLACE: Courtroom Number Three  
Federal Building  
Harrisburg, Pennsylvania

COUNSEL PRESENT:

WILLIAM BEHE, Assistant United States Attorney  
For - United States of America

JAMES WEST, Esquire  
For - Defendant

Vicki L. Fox, RMR  
Official Reporter

## I N D E X

<u>Witnesses</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
1. Andrew Katerman				
By Mr. West	3	--	--	--
By Mr. Behe	--	8	--	--
2. Angela Gallardo				
By Mr. West	9	--	--	--
By Mr. Behe	--	14	--	--

Direct Exam./West - Andrew Katerman

3

1 THE COURT: Good morning.

2 MR. WEST: Good morning, Your Honor.

3 MR. BEHE: Good morning, Your Honor. Your Honor,  
4 this is the matter of the United States of America versus  
5 David Mizic at Criminal Docket Number 01-258.

6 Mr. Mizic is present in court with Mr. West, his  
7 counsel. Now is the time and place set for sentencing in  
8 this matter. Both parties were able to review the revised  
9 presentence investigation report. Mr. West has by way of  
10 letter made certain objections to that revised report.

11 Do you want us to approach, or should we stay  
12 here?

13 THE COURT: I understand you have some witnesses?

14 MR. WEST: I have some very short witnesses, Your  
15 Honor, that will be right to the point I believe.

16 THE COURT: Are they here?

17 MR. WEST: Yes. One is here, and one is on the  
18 way. The one has a small child, and the child needs changed  
19 so she will be here shortly. I could call Mr. Katerman, who  
20 is the Postal Inspector first.

21 Mr. Katerman, will you take the oath, sir?

22

23 ANDREW KATERMAN, called as a witness, being duly  
24 sworn, testified as follows:

25

Direct Exam./West - Andrew Katerman

4

1 THE CLERK: Please state your name for the record  
2 and spell your first and last name.

3 A Andrew Katerman, A-n-d-r-e-w- K-a-t-e-r-m-a-n.

4 DIRECT EXAMINATION

5 BY MR. WEST:

6 Q Mr. Katerman, by whom are you employed?

7 A I am a United States Postal Inspector.

8 Q Four how long?

9 A 13 years.

10 Q In what capacity?

11 A I am a field agent. I investigate mail theft  
12 basically in Central Pennsylvania.

13 Q And you done that for approximately 13 years?

14 A Yes, sir.

15 Q Do you know the defendant in this case David Mizic?

16 A Yes, sir; I do.

17 Q Could you tell the Court briefly how you know David  
18 Mizic?

19 A I arrested David Mizic when he was sentenced in about  
20 '92 I believe it was. He was arrested in like '88 for theft  
21 of mail, bank fraud, I think conspiracy charges.

22 Q Did he cooperate at the time of his arrest?

23 A Yes.

24 Q Now do you know his brother John Mizic?

25 A Yes, I do.

Direct Exam./West - Andrew Katerman

5

1 Q Did you follow David and John after you arrested them  
2 in 1988?

3 A Yes. John Mizic returned to his criminal ways and has  
4 been arrested I believe three other times in Federal Court.

5 Q For theft of mail?

6 A Theft of mail, bank fraud and conspiracy charges, but  
7 David straightened himself after that arrest. I would  
8 contact David routinely when I was looking for John, and he  
9 would provide me with information, he had spoken to John two  
10 or three days ago, he said he was in Pottstown, or he said  
11 he was in Schuylkill Haven or wherever he was.

12 He would tell me -- he never went so far as to  
13 set up a meeting, but he certainly did provide me with the  
14 information he knew about John.

15 Q Did you request that he ask his brother John to  
16 surrender?

17 A Yes. He normally did that of his own accord I would  
18 say.

19 Q Would he tell you that he asked his brother to  
20 surrender?

21 A Yes, he would.

22 Q During the course of John being a fugitive, how many  
23 times did you contact David to seek his assistance?

24 A My best estimate is more than six and probably less  
25 than 20.

Direct Exam./West - Andrew Katerman

6

1 Q Somewhere between six and twenty?

2 A Yes, sir.

3 Q In 1998, did it come to your attention that John Mizic  
4 had again become a fugitive?

5 A Yes.

6 Q Did you contact David Mizic?

7 A Yes, I did.

8 Q And what occurred at that time that you contacted  
9 David Mizic?

10 A I was looking for John as I was all the previous  
11 times, and David was providing me with the information that  
12 he knew two or three days ago, he was in a hotel in this  
13 town. Then eventually, John was arrested in the state of  
14 New Jersey. I can't tell you where. I don't recall.

15 But he was arrested in the state of New Jersey.  
16 He was basically on a balcony of a hotel room. He was so  
17 high they arrested him for his own safety. The EMT's came.  
18 He was yelling and screaming. And then they took him into  
19 custody for his own safety.

20 David called me and told me that John had been  
21 arrested but used the name David Mizic. He gave me the name  
22 of the prison. I called the prison and verified that they  
23 had someone in custody by the name of David Mizic. I told  
24 them that it was in fact John Mizic.

25 They checked the fingerprints, and they decided

Direct Exam./West - Andrew Katerman

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1 that it was in fact John Mizic.

2 Q Is that how the federal warrants were executed for  
3 John Mizic in New Jersey because of that information that  
4 you provided?

5 A To the best of my recollection, that is how the  
6 Marshals became aware that John Mizic was in prison in New  
7 Jersey, yes.

8 Q When John Mizic again became a fugitive in the last  
9 year or so, I believe it is your belief that he is presently  
10 stealing mail out in Western Pennsylvania?

11 A That's correct, in the Western District of  
12 Pennsylvania.

13 Q Did you do anything to contact David to seek his  
14 assistance?

15 A I attempted to contact David. However, he no longer  
16 has the same telephone number and I was unsuccessful. But I  
17 did attempt to contact David less than six months ago.

18 Q Did you give any leads to the Marshal's Service when  
19 they were attempting to locate John Mizic as to how you  
20 would go about attempting to locate him?

21 A I believe I said something to the effect that I had  
22 talked to David Mizic in the past to find where John Mizic  
23 was.

24 Q How many people have you arrested in your career as a  
25 Postal Inspector?

Cross Exam./Behe - Andrew Katerman

8

1 A More than 300.

2 Q How would you rank John -- David Mizic -- strike the  
3 John, please. How would you rank David Mizic insofar as his  
4 cooperation with you upon arrest?

5 A I would say he was in the top five of the cooperative  
6 people. He readily admitted his guilt, helped identify  
7 victims, identified banks, identified people that he stole  
8 mail from, told me people's names. He was certainly -- he  
9 was cooperative when he spoke with me.

10 MR. BEHE: I have no further questions. Thank  
11 you. Mr. Behe.

12 THE COURT: Cross-examine.

13 CROSS-EXAMINATION

14 BY MR. BEHE:

15 Q Agent Katerman, John Mizic escaped from a halfway  
16 house in Harrisburg in May of 2001. Are you familiar with  
17 that?

18 A Yes.

19 Q Your testimony is that with regards to that escape and  
20 David Mizic's conduct that was criminal, that he pled guilty  
21 to here, that he did not provide you any assistance or  
22 cooperation in that matter with regards to trying to find  
23 his brother?

24 A I have not spoken with David Mizic since May of 2001,  
25 that's correct.



Cross Exam./Behe - Andrew Katerman

9

1 Q So he has provided you nothing with regards to that?

2 A Absolutely.

3 Q Everything you are talking about was --

4 A Prior.

5 Q -- prior to '98, etcetera?

6 A Yes.

7 MR. BEHE: Thank you. That is all I have.

8 THE COURT: Redirect?

9 MR. WEST: None. May this witness be excused?

10 THE COURT: Yes. You are excused.

11 A Thank you, Your Honor.

12 MR. WEST: Your Honor, my next witness had an  
13 accident with her child. She has got a child less than one  
14 years old. My secretary was helping her change the diaper  
15 when I left the office. My secretary is under instructions  
16 to bring her right down here.

17 THE COURT: We can take a recess until then.

18 MR. WEST: It should be momentarily. I  
19 appreciate the Court's indulgence.

20 (A recess was taken.)

21 AFTER RECESS

22 MR. BEHE: Thank you for your taking the recess,  
23 Your Honor. I apologize.

24 THE COURT: No problem.

25 MR. WEST: Angela Gallardo.

Direct Exam./West - Angela Gallardo

10

1 ANGELA GALLARDO, called as a witness, being duly  
2 sworn, testified as follows:

3 THE CLERK: Would you please state your full name  
4 and spell your first and last name for the record?

5 A Angela Gallardo, A-n-g-e-l-a G-a-l-l-a-r-d-o.

6 BY MR. WEST:

7 Q It is Mrs. Gallardo?

8 A Gallardo.

9 Q Okay. And is that your baby and your friend in the  
10 back of the room?

11 A Yes.

12 Q That was the reason you were a little late in getting  
13 here; is that correct?

14 A Yes.

15 Q You have driven here from where today?

16 A From Pottstown, Pennsylvania.

17 Q Is that Pottstown in Montgomery County as opposed to  
18 Pottsville in Schuylkill County?

19 A Correct.

20 Q Are you related to the defendant in this case?

21 A Yes. He is my father.

22 Q And I just have a few questions. Are you familiar  
23 with your uncle John Mizic becoming a fugitive?

24 A Yes.

25 Q How are you familiar with that?

Direct Exam./West - Angela Gallardo

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1 A Through my father and through Uncle John calling.

2 Q Now are you aware as to whether or not John Mizic  
3 contacts your father?

4 A No longer he doesn't. When he first became a fugitive  
5 again, he did.

6 Q How would he contact him?

7 A Through his cellphone.

8 Q In other words, John Mizic would call your father on  
9 his cellphone?

10 A Yes.

11 Q Have you ever heard your father attempt to talk John  
12 into surrendering?

13 A Yes, I did.

14 Q Could you tell us the facts surrounding that?

15 A I remember he was telling him -- he was telling him  
16 not to be stupid. He only had two weeks to go in a halfway  
17 house, not to mess things up now when he was so close to the  
18 end.

19 I remember he did offer him some money. He said  
20 just take it, and don't commit a crime. Think about what  
21 you are doing here. Take a little vacation and turn  
22 yourself in.

23 Q Did your father give you any reason why he gave John  
24 money after he walked away from the halfway house?

25 A Because he didn't want him to go commit another crime.

Direct Exam./West - Angela Gallardo

12

1 Q Were you present when the Marshals came to interview  
2 your father?

3 A Yes, I was.

4 Q Was that at your house?

5 A Yes.

6 Q Could you tell the Court what occurred there?

7 A I was downstairs. U.S. Marshals knocked on the door.  
8 I answered the door. I called my dad down. He was  
9 upstairs. They came in. They just started asking him  
10 questions about my Uncle John and everything.

11 Q Let me ask you this: Was your dad truthful with them?

12 A Yes, he was. In fact, the U.S. Marshal said we did  
13 come here to arrest you, but since you were honest with us,  
14 we won't.

15 Q What did your father truthfully tell the Marshals in  
16 their opinion?

17 A He told them that he was cleaning out John and Karen's  
18 house trying to get some things together to take to Karen's  
19 mother. They said that was a good idea. In fact, he should  
20 hurry up and do it before they had to close up the house  
21 because they didn't want to see the kids lose everything.

22 Q You mean the landlord would put a lock on the house?

23 A I guess that is what they meant, the landlord. I  
24 don't know who they meant would put a lock on the house.  
25 They didn't want the kids to lose everything, too.

Direct Exam./West - Angela Gallardo

13

1 Q Continue. What else occurred that day?

2 A My dad told them that he did take the car back for my  
3 Uncle John.

4 Q The rental car?

5 A Yes, rather than letting it sit and be stolen. I  
6 believe he did tell them about giving him the money so he  
7 wouldn't leave.

8 He told him that in the past he did turn my Uncle  
9 in, but that he was not going to set him up this time.

10 Q Is that your father's words I will not set him up?

11 A Yes. He said he wasn't going to set him up. That is  
12 what they wanted him to do.

13 Q Did he agree that he would try to urge him to  
14 surrender?

15 A Yes, he did. He said he'll talk to John, try to talk  
16 him into turning himself in because he didn't want to see  
17 things get ugly for the kid's safety and for their safety.

18 Q I believe you have recently lost your mother?

19 A Yes.

20 Q Was that a long illness?

21 A Yes.

22 Q Was your father a caregiver during that illness?

23 A Yes.

24 Q How long did the illness last?

25 A I am sorry?

Cross Exam./Behe - Angela Gallardo

14

1 Q How long did the illness last?

2 A Probably since I was in sixth grade. That's when it  
3 got really bad. She had diabetes all my life, but that is  
4 when it started to turn.

5 Q How long was she wheelchair bound?

6 A I would say for the last two years of her life.

7 Q Was she bedridden at any point?

8 A Yes, she had a hospital bed in our house and  
9 everything.

10 Q Would your father take the majority of the care of  
11 your dying mother?

12 A Yes, my dad would bathe her, empty her potty because  
13 she couldn't walk more than a couple of feet, pick her up  
14 and take her to and from dialysis. He would give her her  
15 medication, give her her IV, everything. She had a medical  
16 port in her chest. He took care of that.

17 MR. WEST: Those are all the questions I have.  
18 Thank you.

19 THE COURT: Cross.

20 CROSS-EXAMINATION

21 BY MR. BEHE:

22 Q Ma'am, I believe that you said that the explanation  
23 offered by your father to the United States Marshals for  
24 meeting your Uncle John in a parking lot to take the rental  
25 car back to a storage facility was because he didn't want

Cross Exam./Behe - Angela Gallardo

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1 somebody to steal it?

2 A No, he didn't want it to be stolen. He wanted to make  
3 sure the rental car got back to the proper place rather than  
4 just letting it sit. And then that would be another thing  
5 against my Uncle John.

6 Q He didn't say anything like the Marshals said he did  
7 that he returned it so that his brother, your Uncle John,  
8 wouldn't get caught when he was returning the rental car?

9 A Not that I am aware of. I was sitting two feet from  
10 him. I didn't hear the words so he wouldn't get caught. I  
11 didn't hear those words at all.

12 MR. BEHE: All right. That is all I have.

13 THE COURT: You may step down. Any other  
14 witnesses?

15 MR. WEST: No, Your Honor.

16 THE COURT: Approach then.

17 MR. WEST: I would only ask one other thing.  
18 There was a letter that was written by Mr. Mizic, if it  
19 could be just filed with the presentence report under seal  
20 as an exhibit. He has specifically asked me to file that as  
21 his reasons for not appearing.

22 THE COURT: Is that the one he wrote to me?

23 MR. WEST: Yes. That is the one he wrote to the  
24 Court, Your Honor. I do have a copy of it that was faxed to  
25 me. I don't know the quality of it.

Cross Exam./Behe - Angela Gallardo

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1 I would just request, not as a court record, but  
2 it as something that would go as an addendum to the  
3 presentence report and is a sealed attachment to the  
4 presentence report.

5 THE COURT: It's already filed as of record.

6 MR. WEST: I am sorry. I didn't know that, Your  
7 Honor.

8 THE COURT: I think it went to the Clerk's Office  
9 because they have it in the file Harrisburg, July 31, Mary  
10 D'Andrea, Clerk by -- I don't know who did it as Deputy  
11 Clerk.

12 MR. WEST: That is all I wanted, Your Honor.  
13 Mr. Mizic requested that I see that that record be on the  
14 record, and that is all.

15 THE COURT: Okay. Lori, I want to give you the  
16 original. Put that with the original.

17 Mr. West, you have two basic objections here.  
18 One is adjustment for acceptance of responsibility and  
19 adjustment for obstruction of justice. Let's talk about the  
20 first one, and that is acceptance of responsibility.

21 In that regard, I want you to be aware of the  
22 fact that I had denied acceptance of responsibility where  
23 between the time of the plea and the time of sentencing  
24 there is continued drug use. And I can't find the case, but  
25 there is a case on that I have relied upon.



Cross Exam./Behe - Angela Gallardo

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1 MR. WEST: I think it is absolutely a factor. I  
2 did some research on the book I brought. I didn't bring it  
3 with me. It is the Federal Sentencing Guidelines. And I  
4 believe under the obstruction of justice section, there is a  
5 commentary note --

6 THE COURT: Okay.

7 MR. WEST: -- that says continued drug use is not  
8 obstruction, but it may be considered by the Court as a  
9 factor in determining whether to get acceptance of  
10 responsibility.

11 I believe that the people that prepared the  
12 Guidelines put that in specifically so that that can be  
13 done. I do believe there is a Third Circuit case that  
14 upholds that.

15 But I turn to the fact that that is always  
16 discretionary with the Court. And I do believe that his  
17 last two drug tests, which would be one on July 25th that he  
18 took in Reading and the one he took here when he surrendered  
19 here last Friday, have been negative.

20 Certainly nine must strain the patience of the  
21 Court, but these were in the Eastern District. I think  
22 there are different standards there. I know in the Middle  
23 District, nine flunked drug tests are an awful lot. I am  
24 not arguing that it is not a factor to be taken into  
25 consideration.

Cross Exam./Behe - Angela Gallardo

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1 But I am arguing, and it is sort of a mitigation  
2 of what he has done because when you look at this, I am sort  
3 of saying it is so outside the heartland, he should get  
4 acceptance of responsibility. He had a wife who died. He  
5 went back to drugs. That was a shame on him, but he is not  
6 here being sentenced for going back to drugs and going back  
7 to methamphetamine.

8 He has cooperated. He drew the line on his  
9 cooperation at the level where I will not set my brother up,  
10 but anything else I can do, including giving him sage advice  
11 as to not to walk away from the halfway house, not to engage  
12 in any additional criminal activity, after you do to  
13 surrender yourself and make things go easy on you.

14 Over his fourteen years of remaining crime free,  
15 he has been the government's best friend insofar as bringing  
16 his brother in, bringing him in alive so that he hasn't hurt  
17 himself with drugs, and helping the law enforcement  
18 authorities to, if you will, rehabilitate his brother as he  
19 himself rehabilitated himself from going to a life of crime  
20 for the first half of his adult life, which basically  
21 consisted of robbing mailboxes, which he was charged with  
22 both at the state and federal level and sentenced to  
23 significant periods of jail to 1987 until he stands here  
24 today engaging in taking care of his sick wife, which you  
25 have heard about today, and in other ways assisting the

Cross Exam./Behe - Angela Gallardo

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1 government within the bounds of decency and reason insofar  
2 as the government certainly is entitled to assistance under  
3 those particular circumstances.

4 So I think that while Your Honor can put on the  
5 scales the drug use -- and it certainly weighs heavily -- on  
6 the other side of the scales goes the fact that there has  
7 been this fourteen year hiatus in which he has done  
8 constructive things under adverse circumstances.

9 He lost his 20 percent Vietnam Veteran disability  
10 because of his drug use. He has difficulty getting a job  
11 because he hurt himself on the job. That is documented. He  
12 needs a back operation which is probably going to be denied  
13 to him under his workmen's compensation settlement if he is  
14 incarcerated for any lengthy period of time. I think he has  
15 got eight months left on his civil settlement agreement on  
16 his workmen's compensation case that they will provide him  
17 medical aid.

18 So there are factors that the Court can consider  
19 on the acceptance of responsibility aspect that are outside  
20 the heartland, that are different factors than your normally  
21 I aided and abetted the CEO of this company and hiding the  
22 accounting, or hiding after he fled, after he was being  
23 sought for being arrested.

24 He has walked the line. He has tried to balance  
25 his obligations between legal obligation and moral

Cross Exam./Behe - Angela Gallardo

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1 obligation. And I think he erred. There is no excuse for  
2 providing money to someone who has walked away from a  
3 halfway house or is about to walk away from a halfway house.  
4 That is legal guilt.

5 I think it is an important concept of moral guilt  
6 that -- I don't want to call it an unwritten law, but it's  
7 something that can be thrown on the scales in making that  
8 determination. The Federal Courts have many cases where  
9 people are legally guilty.

10 When I first started as an Assistant U.S.  
11 Attorney, the Vietnam War was going on. People were being  
12 prosecuted for draft evasion and properly so. But still  
13 there is this legal versus moral guilt that I think this  
14 Court can take into consideration in arriving at a decision  
15 on this case.

16 THE COURT: Do you want to address the  
17 obstruction?

18 MR. WEST: I believe the obstruction is strictly  
19 based on one factor, which was his failure to appear. And,  
20 again, the commentary specifically says that failure to  
21 appear is a basis for an obstruction count, as well as  
22 escape and continued criminal activity. But he uses the  
23 word willfully.

24 We did have that out of this District go up  
25 before the Third Circuit and cert. being denied. I believe

Cross Exam./Behe - Angela Gallardo

21

1 it was the Bellatear (spelled phonetically) case. And in  
2 the Bellatear case, Mr. Bellatear on the eve of forfeitures  
3 and on the eve of his guilty plea transferred to his wife a  
4 very valuable piece of property which was going to compound  
5 the forfeiture attorney in this District's job in forfeiting  
6 that piece of property.

7 And the Circuit -- and I didn't agree with them  
8 at that time, but I do agree with them this time. The  
9 Circuit said that under Skrews (spelled phonetically) v.  
10 United States, when you are talking about intent, you are  
11 talking about bad intent, evil intent.

12 And then they said something that is an  
13 impossible burden for the prosecutor, but they said they  
14 haven't proved that bad intent beyond the preponderance of  
15 the evidence in this particular case. And they said that it  
16 was wrong to give Mr. Bellatear a two point upward departure  
17 for obstruction of justice based on that conduct.

18 What I focus on there is the bad intent, evil  
19 intent aspect. This system unfortunately today survives  
20 with the number of laws that Congress has passed based on  
21 guilty pleas being processed. I can remember a day when  
22 trials were a very frequent occurrence on the criminal site  
23 and the Courts were able to dispose of them in a very, very  
24 deliberate and well thought out fashion.

25 But today, guilty pleas I think are really the

Cross Exam./Behe - Angela Gallardo

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1 life blood of the system going forward. And it is a shame  
2 that it has come out that way. Every once in a while, one  
3 is going to take a little more time than another.

4 THE COURT: Are you aware of the fact that this  
5 is the second time he did not show?

6 MR. WEST: No.

7 THE COURT: He was supposed to appear on  
8 January 24th, 2002 and did not, and we had to reschedule it  
9 for February.

10 MR. WEST: The failure to appear on January --

11 THE COURT: For the plea. There was a  
12 January 24, 2002 9:30 AM change of plea. He didn't show.  
13 We had to reschedule it.

14 THE DEFENDANT: Your Honor?

15 THE COURT: Yes, sir.

16 THE DEFENDANT: I had notified the U.S.  
17 Attorney's Office in advance that it was going to be  
18 difficult for me to make that, and they said that they would  
19 reschedule it.

20 MR. WEST: I talked to him about this. I know he  
21 had lost his driver's license.

22 THE DEFENDANT: I had spoken to them beforehand  
23 about that. He told me that it would be rescheduled. I  
24 don't think there was ever a warrant put out for me.

25 MR. WEST: Who did you talk to?

Cross Exam./Behe - Angela Gallardo

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1 THE DEFENDANT: I talked to Mr. Kluz to the U.S.  
2 Attorney's Office.

3 MR. WEST: You didn't talk to the U.S. Attorney's  
4 Office?

5 THE DEFENDANT: No. There was never a warrant  
6 put out for me; was there?

7 THE COURT: There wasn't a warrant put out for  
8 you this last time either; was there?

9 THE DEFENDANT: Yes, there was.

10 MR. WEST: July 31st, there was a warrant.

11 THE DEFENDANT: I had spoken to my attorney well  
12 in advance of that date, that it was going to be difficult  
13 because of some medical problems that I was having.

14 THE COURT: Did you make this statement to either  
15 the U.S. Attorney or Mr. Kluz that if you wanted me there in  
16 court, you are going to have to send an ambulance for me?

17 THE DEFENDANT: I might have said something like  
18 that. Yes, I might have said something like that. At the  
19 time, I couldn't even get out of bed, Your Honor.

20 THE COURT: All right.

21 MR. WEST: I will speak briefly and conclude on  
22 the obstruction part. Sometimes, some of the pleas are  
23 going to take longer than others. But I think it is very  
24 important that the Defendant feel that he has been heard,  
25 that his arguments about Miranda, his arguments about

Cross Exam./Behe - Angela Gallardo

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1 withdrawing the plea, his arguments about factual statements  
2 in the presentence report are listened to and are evaluated,  
3 and a decision made as to what is the appropriate course to  
4 proceed.

5 When I first met the defendant, he wanted to  
6 withdraw his plea. He was adamant. We discussed it for a  
7 long time. And he took my advice. That it is the best  
8 thing to go forward with this plea under the facts and  
9 circumstances of this particular case.

10 Am I correct on that?

11 THE DEFENDANT: Yes, you are.

12 MR. WEST: But it took patience and time and  
13 reasoning with him to get him here in the position that he  
14 is in. And there is no doubt in my mind it is the best  
15 position for him to be in today. And he has to take my word  
16 as his attorney for that.

17 I don't think he had any evil intent. I think  
18 that he was to some extent -- and he would deny this --  
19 afraid of what was going to happen and was not attempting to  
20 show any contempt towards the Court.

21 I think the factors in his letter are factors  
22 that did motivate him. He is very remote from the Court.  
23 He was remote from his appointed counsel. And it was tough  
24 for him to communicate with his appointed counsel.

25 And I think that the fact that even after not



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1 appearing, he realized as he has told his brother over the  
2 last fourteen years, you have to appear here. You have to  
3 take your medicine. It will go easier on you.

4 He knew those things and stayed in touch with the  
5 Probation Officer Mrs. Baker. He stayed in touch with the  
6 Court by mail, stayed in touch with his counsel and stayed  
7 in touch with me when I was appointed and did appear here.

8 I know there is discretion on this, but to me, it  
9 is at the low end, that it shouldn't be something that takes  
10 him from zero to six to two to eight. And that would be my  
11 presentation on that -- or my argument on that, Your Honor.

12 THE COURT: Do you wish to speak on your own  
13 behalf?

14 THE DEFENDANT: Yes, Your Honor. Concerning the  
15 matter with the Mr. Kluz and I, who really never saw eye to  
16 eye, I am sorry that I didn't appear when I was scheduled to  
17 appear, but Mr. Kluz -- all I wanted him to do was represent  
18 me as Mr. West has. I didn't get any representation from  
19 him.

20 All I wanted was somebody to represent me, you  
21 know. And that's why I delayed my surrender. It had  
22 nothing to do, believe me, with any disrespect for the  
23 Court.

24 THE COURT: Mr. Behe?

25 MR. BEHE: Yes, Your Honor. Since everybody has

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1 concluded with the obstruction argument, I will address that  
2 one first.

3 I believe that the obstruction enhancement on its  
4 face could apply. But as with everything else, Your Honor  
5 has to consider someone's explanation as to whether or not  
6 that will mitigate or satisfy the Court. I should say that  
7 the explanation is not reasonable, but perhaps acceptable  
8 because it was the Court that was inconvenienced.

9 I am at the disadvantage because I don't have the  
10 letter in front of me with all of the reasons and  
11 explanations for it. So I will defer to the Court on that.

12 I think the fact that the application notes to  
13 that section specifically describe the situation where  
14 somebody -- fails to appear and makes his case different  
15 from Bellatear where they were wrestling with whether the  
16 filing of a quick claim deed was something that impacted the  
17 case or the instant offense. But as I say, the fact that it  
18 might technically be made out doesn't mean that Your Honor  
19 has to blindly apply it. It is the explanation offered by  
20 the individual who didn't show up that Your Honor has to  
21 consider.

22 With regard to acceptance of responsibility, I  
23 kind of view that as another matter, an individual  
24 repeatedly using drugs while they are at liberty, the Court  
25 letting someone out with restrictions that allow them to

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1 remain free, and they go ahead and continue to use  
2 controlled substances during that period of time, to me  
3 shows that they just have not accepted responsibility.

4 I believe that the Defendant's comments to the  
5 Probation Officer while, of course, showing not unexpectedly  
6 a loyalty towards this family show him to be clearly  
7 unrepentant to the extent he said I would do it again in  
8 terms of providing money and support to his brother if this  
9 situation arose.

10 So if Your Honor accepts the drug use alone, I  
11 believe that would be enough to deny acceptance. Whether  
12 being unrepentant at the same time you plead guilty means  
13 you don't accept responsibility, I suppose is a separate  
14 matter.

15 If Your Honor looks at it in practical terms, if  
16 you rule in Mr. Mizic's favor on all of these, he is at zero  
17 to six. If you rule against him, he is two to eight. There  
18 is a substantial overlap of the range there.

19 As a practical matter, if Your Honor is asking  
20 for sentencing recommendation, I would respectfully request  
21 that he be sentenced to a term of imprisonment of six  
22 months.

23 THE COURT: First of all, with regard to the  
24 objections, I am going to stand by the Probation Officer's  
25 disinclination to grant acceptance of responsibility. I

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1 have to be consistent with my position with regard to the  
2 use of drugs while people are out on bail waiting  
3 sentencing. So I am not going to give you an adjustment for  
4 acceptance of responsibility.

5 As far as the obstruction of justice, that's is  
6 an offense that I am going to give him the benefit of the  
7 doubt on that and delete adjustment for obstruction.

8 The very fact that he was in constant  
9 communication with Ms. Baker, is evidence of his intent that  
10 he would show up and he did show up and bring himself in so  
11 that having to enforce the warrant did not become necessary.

12 In that regard, the Order is: AND NOW this 16th  
13 day of August, the year 2002, pursuant to the Sentencing  
14 Reform Act of 1984, it is the judgment of the Court that the  
15 Defendant David Mizic is hereby committed to the custody of  
16 the Bureau of Prisons to be imprisoned for a term of six  
17 months.

18 The Court finds that the Defendant does not have  
19 the ability to pay a fine. It is ordered that the Defendant  
20 pay to the United States a special assessment of \$100.00.  
21 The assessment is due in full immediately and shall be paid  
22 through the Clerk of Court.

23 The following statement of reasons is placed on  
24 the record for the sentence that has been imposed: The  
25 Court adopts the factual findings and the Guideline

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1 application in the presentence report except that the  
2 enhancement for obstruction is deleted, which changes the  
3 total offense level to four and imprisonment range of zero  
4 to six months. The fine is waived because of the  
5 Defendant's inability to pay.

6 The sentence is within the Guideline range. That  
7 range does not exceed 24 months, and the Court finds no  
8 reason to depart from the sentence called for by the  
9 application of the Guidelines.

10 Now, Mr. Mizic, you can appeal your conviction if  
11 you believe that your guilty plea was somehow unlawful or  
12 involuntary, or that there is some other fundamental defect  
13 in these proceedings that was not waived by your guilty  
14 plea.

15 You also have a statutory right to appeal your  
16 sentence under certain circumstances, particularly if you  
17 think this sentence is contrary to law.

18 You have ten days from this day in which to file  
19 a notice of appeal. Mr. West will continue to represent you  
20 without cost to take an appeal should you desire to do so.

21 You may also request the Clerk of Court to  
22 prepare and file a notice of appeal on your behalf.

23 Do I understand that you had a doctor's  
24 appointment recently?

25 THE DEFENDANT: Yes. I was supposed to see a

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1 neurosurgeon today I think it was.

2 THE COURT: Is that still available?

3 THE DEFENDANT: No, I don't think so.

4 THE COURT: Is your need for an operation  
5 imminent?

6 THE DEFENDANT: Well, actually, he was supposed  
7 to decide. It was going to be whatever -- my family doctor  
8 had been urging me actually for the last eight months to see  
9 him, but I hadn't had my workmen's compensation settled so  
10 there was actually no responsibility for the medical bills.  
11 So I hadn't seen him. I just settled my workmen' comp.

12 THE COURT: Well, my concern is, first of all as  
13 far as his compensation paying for his operation, six months  
14 -- he has eight months to go. He has two months on that.  
15 But at the same time, I need to know whether if it is  
16 imminent whether he needs to be placed in a Bureau of  
17 Prisons hospital.

18 MR. WEST: Your appointment is gone; is that  
19 correct?

20 THE DEFENDANT: Yes.

21 MR. WEST: You cancelled it?

22 THE DEFENDANT: No, I was supposed to be there  
23 today.

24 MR. WEST: What time?

25 THE DEFENDANT: This morning at 8:30.

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1 MR. WEST: Mrs. Baker pointed out that the Bureau  
2 of Prisons does have a facility. I do know he needs to be  
3 evaluated as to whether or not he needs an operation. And  
4 anything the Court can do --

5 THE COURT: I can, but it is going to be  
6 recommending a place that is not going to be in this area.

7 THE DEFENDANT: Your Honor, I would rather pass  
8 on that simply because, first of all, while incarcerated, my  
9 workmen's comp. isn't going to cover it.

10 THE COURT: Will they pick up on it after you are  
11 released?

12 THE DEFENDANT: Yes. You have to consider  
13 rehabilitation, all those things. After one year, my  
14 medical coverage stops dead on the day. I get nothing.  
15 Dead on the day, whether I am recovered or not.

16 If I get an operation the day before, they will  
17 cover the operation. But the day after, they won't cover  
18 the medications. I could fall into a real bad hole there if  
19 something happens in the operation.

20 THE COURT: Do you want a recommendation to be  
21 placed in a prison hospital?

22 THE DEFENDANT: No, Your Honor. I would rather  
23 not. I would appreciate, Your Honor, if you would -- my  
24 medications, I do need the medications. The medications  
25 help me, the pain medication.

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1 THE COURT: You will get those. You will be  
2 evaluated.

3 THE DEFENDANT: Fine.

4 THE COURT: Will the medicines go with him?

5 THE DEFENDANT: I have medicines at the County  
6 Jail right now.

7 MR. WEST: He brought them when he surrendered.

8 THE COURT: They will take them from you.

9 THE DEFENDANT: And administer them to me.

10 MR. WEST: Your Honor, if I may, I am going to  
11 meet with him and discuss this, but I may come back to the  
12 Court and just ask like work release for just a day, that he  
13 go to the doctor if we can resurrect that appointment, and  
14 at least find out whether he needs this operation.

15 Because it could be -- under Your Honor's  
16 sentence it could be right when he is released. After six  
17 months, he could get the operation.

18 THE COURT: I don't know how long it is going to  
19 take you to get an appointment for him. I am going to keep  
20 you in custody until you find out when the appointment is.

21 MR. WEST: I will find out. I will consult with  
22 him, and I will report back to the Court as to what he  
23 wants.

24 THE COURT: Court is adjourned.

25 (Whereupon, the proceedings were concluded.)



1 I hereby certify that the proceedings and  
2 evidence are contained fully and accurately in the notes  
3 taken by me on the trial of the above cause, and that this  
4 copy is a correct transcript of the same.

5  
6 Vicki L. Fox, RMR

7 Vicki L. Fox, RMR

8 Official Reporter  
9  
10

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